JOHN M. WALKER, JR., *Circuit Judge*, dissenting:

I would affirm the district court. The remaining plaintiffs in this case have failed to specify that any actual injury was caused by the President's alleged violation of the Emoluments Clauses, or how this Court could redress such an injury. None of this matters, they say, because the competitor standing doctrine allows us to ignore these pleading failures and to find standing anyway. I disagree and would hold that the complaint fails to sufficiently allege Article III standing.

Invoking constitutional provisions never directly litigated in the 230-year history of our Republic prior to the Trump presidency, the plaintiffs in this case claim that the President has inflicted competitive injury on their businesses by maintaining ownership over the Trump Organization's high-end hotels and restaurants and accepting the business of foreign and state official clientele in contravention of both the Foreign Emoluments Clause[1] and the Domestic Emoluments Clause.[2] The plaintiffs, who are owners of other high-end hotels and restaurants in New York City and Washington, D.C.,[3] allege that their businesses have suffered because

---

[1] "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9, cl. 8.

[2] "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7.

[3] Only two plaintiffs remain in the appeal: Eric Goode and ROC United. Goode is the owner of "several celebrated hotels, restaurants, bars, and event spaces in New York," which include the Maritime Hotel, the Bowery Hotel, the Ludlow Hotel, the Jane Hotel, and the Park, Waverly Inn, and Gemma restaurants. Compl. ¶ 228. ROC United is a nonprofit organization that advocates for wages and

foreign and state government officials want what only the Trump-owned establishments can offer: "access to, influence on, and the good will of the President of the United States."[4]

As this case comes to us now, it is about constitutional standing, not the precise meaning of the Emoluments Clauses. The meaning of the Clauses may be addressed elsewhere in due course, but even in their unresolved state, a few (largely uncontroversial) observations about the Clauses are in order. First, nothing in the plain text of either Emoluments Clause addresses competition in the marketplace or the conduct of business competitors generally. And neither can the Clauses be considered sweeping anti-corruption provisions. Facially, the Foreign Emoluments Clause concerns only the receipt of "emoluments" from foreign governments or their officials by those "holding any Office of Profit or Trust" on behalf of the United States and the Domestic Emoluments Clause only prohibits the President from receiving "emoluments" beyond the salary of the office from "the United States, or any or them." Neither Clause addresses the receipt of benefits (whether or not they are "emoluments") by the President from members of the public, private businesses, or private

---

working conditions for restaurant workers; it is made up of restaurant members and restaurant-employee members. **[A66]** The complaint alleges that several of ROC United's restaurant members compete directly with the Trump International Hotel & Tower in New York, the Trump International Hotel Washington, D.C., and the restaurants inside the Trump Tower and Trump World Tower located in New York City. **[A67]** A declaration from an industry expert submitted by the plaintiffs names several restaurants associated with ROC United that compete directly with Trump-owned properties. In New York City, these establishments include: The Modern, Gramercy Tavern, Craft, and Riverpark. **[A312–15]** In Washington, D.C., the ROC United competitor restaurants are: the Riggsby, Minibar, Jaleo, Casolare Ristorante, and Zaytinya. **[A319–22]**

[4] Compl. ¶ 150.

parties who seek government favors.[5] Thus neither competition nor ordinary corruption are targeted by the Clauses or lie anywhere near the heart of this case.

What is meant by the term "emolument" in the Emoluments Clauses has yet to be determined by any federal court. Regardless of whether the Emoluments Clauses encompass, as the plaintiffs have urged, anything of value,[6] or whether the Clauses capture a narrower range of exchanges,[7] the text and historical meaning plainly do not evidence concern for protecting fair competition in the marketplace.

Of course, none of these observations foreclose the possibility (however slim) that parties may pursue a private right of action (should such a right be recognized) to remedy commercial harms

---

[5] *See* U.S. Const. art. I, § 9, cl. 8; art. II, § 1, cl. 7.

[6] *See* Appellants' Br. at 6–7; *see also* Norman L. Eisen, Richard Painter & Laurence H. Tribe, Brookings, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* 11 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (arguing that the Emoluments Clause warrants the "broadest possible construction to the payments it encompasses" and thus "unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state"); Zephyr Teachout, Opinion, *Trump's Foreign Business Ties May Violate the Constitution*, N.Y. Times, Nov. 17, 2016, https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution.

[7] *See* Amandeep S. Grewel, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639, 641–42 (2017) (arguing that the Foreign Emoluments Clause covers only "office-related compensation"); *see also* Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 Ga. L. Rev. 1 (2017) (arguing that "emolument[s] in the Constitution meant compensation with financial value, received by reason of public office"); Eugene Kontorovich, Opinion, *Did George Washington Take 'Emoluments'?*, Wall St. J., Apr. 17, 2017, http://www.wsj.com/articles/did-george-washington-take-emoluments-1492123033 (arguing that George's Washington's private business dealings while in office cast doubt on whether President Trump's business holdings violate the Foreign Emoluments Clause).

wrought by violations of the Emoluments Clauses or exclude the prospect that the Clauses as applied to a particular case could somehow affect market competition. Neither clause on its face, however, gives any indication that it is concerned with maintaining competition, or that it protects a right enforceable in the manner the plaintiffs have chosen to pursue.

Finally, this case is deeply political and thus finds itself in an area where federal courts ought to tread lightly. President Trump was democratically elected by the American people—and he was elected with his business holdings and brand prominence in full view. What's more, it is evident from the text of the Emoluments Clauses that they pertain to questions of separation of powers and, in particular, the relationship between the President and the Congress. Whether the courts should properly play any role pertaining to that relationship in the context of the Clauses will have to be determined in the future.

I.

Whatever the resolution of these various background questions, only one issue is before us now: have the plaintiffs sufficiently alleged constitutional standing to challenge the President's alleged violations of the Emoluments Clauses? The tripartite test for standing under Article III is well known: "an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[8] A plaintiff's obligation to meet this test is an immovable feature of our constitutional structure; constitutional standing is a "bedrock requirement" and "an irreducible minimum" without

[8] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

which there is no case or controversy under Article III of the Constitution.[9] And, the standing inquiry is "especially rigorous" when the dispute implicates, as it does here, the separation of powers.[10]

The plaintiffs, as the party invoking federal jurisdiction, bear the burden of establishing constitutional standing.[11] At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element."[12] The "reviewing court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[13]

Here the pleadings do not particularize any direct injury actually caused by violations of the Emoluments Clauses, much less how such injury might actually be redressed by the courts. Rather, the plaintiffs (and the majority) rely entirely on a shortcut known as the competitor standing doctrine. This doctrine allows a competitor-plaintiff the presumption of injury in fact, traceability, and redressability when the plaintiff is almost sure to suffer a competitive injury as a matter of "economic logic."[14]

---

[9] *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 472 (1982); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (articulating that Article III's "Cases" and "Controversies" requirement is a "fundamental limitation" and is "founded in concern about the proper—and properly limited—role of courts in a democratic society" (internal quotation marks and citations omitted)).

[10] *Clapper*, 568 U.S. at 408 (internal quotation marks omitted).

[11] *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016).

[12] *Id*. (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

[13] *Warth*, 422 U.S. at 501.

[14] *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008).

The question of whether the competitor standing doctrine finds any traction in private suits brought under the Emoluments Clauses was recently addressed in *In re Donald J. Trump* by the Fourth Circuit, the first circuit to do so.[15] In that case, the District of Columbia and the State of Maryland sued the President alleging that he violated the Emoluments Clauses and that, among other injuries, those violations harmed their proprietary interests as businesses competing with the Trump Organization.[16] The Fourth Circuit held, correctly in my view, that the plaintiffs could not invoke the competitor standing doctrine to achieve Article III standing.[17]

Injury in fact. The competitor standing doctrine "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors."[18] The doctrine allows plaintiffs to proceed if the economically logical cause and effect between a government action and increased competition is strong enough to support an inference of injury in fact to the competitor, "even though empirical analysis might conceivably have provided a higher level of certainty."[19] Of course, this doctrinal exception does not excuse the plaintiff from satisfying all three Article III standing requirements; all it does is exempt the plaintiff from showing an actual or imminent injury when the alleged harm arises in a market context where the actual injury may be difficult to demonstrate but is almost sure to

---

[15] *In re Donald J. Trump*, 928 F.3d 360, 363, 366 (4th Cir. 2019).

[16] *Id.* at 363.

[17] *Id.* at 377.

[18] *Canadian Lumber*, 517 F.3d at 1332 (citing *Clinton v. City of New York*, 524 U.S. 417, 433 (1998)).

[19] *Canadian Lumber*, 517 F.3d at 1333.

occur.[20] It bears repeating that the plaintiffs here rely on the competitor standing doctrine because they cannot show (and have not alleged) that they have suffered any particularized injury caused by the violations they allege.

Well-established precedent gives a competitor standing plaintiff latitude to allege competitive injury, but the competitive injury pleading exception, based as it is on economic logic, cannot be universally applied to every competitor. "[T]o establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit."[21] Other courts have correctly indicated that the plaintiff must be a "direct competitor[]."[22] The plaintiff must also show "an actual or imminent increase in competition, which increase [the court] recognize[s] will almost certainly cause an injury in fact."[23]

Taken in isolation, the phrase from Second Circuit precedent—injury is shown if the plaintiff "competes in the same arena"[24]—can be read to suggest that a minimal allegation of direct competition is sufficient. In light of this seemingly low injury-in-fact bar, the majority opinion maintains that the plaintiffs have met this

---

[20] *See, e.g.*, *El Paso Nat. Gas Co. v. F.E.R.C*, 50 F.3d 23, 27 (D.C. Cir. 1995); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825–26 (9th Cir. 2011).

[21] *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1029 (2d Cir. 1989); **[JON (diss.), ALK, *RJC*]** *see also Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002). **[JMcL, PNL, *SS*]**

[22] *TrafficSchool*, 653 F.3d at 826; *see also Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (noting that the Supreme Court's competitor standing cases "are all premised on a plaintiff's *status* as a *direct competitor*" (emphasis in original)).

[23] *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *see also Inv. Co. Inst. v. F.D.I.C.*, 815 F.2d 1540, 1543 (D.C. Cir. 1987) (competitor standing satisfied when increased competition "'plainly threatens' economic injury").

[24] *USCC*, 885 F.2d at 1029.

standard.[25] I agree with the majority that our prior cases are capable of this broad reading, but after the Supreme Court's decision in *Already, LLC v. Nike, Inc.*,[26] and upon close examination of the kinds of cases that have applied the competitor standing doctrine, it is more than evident to me that the doctrine does not, and should not, reach this case.

In *Already*, the plaintiff, a shoe company, sought to challenge one of Nike's trademarks even after Nike issued a broad covenant promising not to pursue trademark claims against potentially infringing Already products and any future similar products manufactured by Already.[27] The Court rejected the theory that Already had standing to challenge the validity of Nike's trademark simply because it was Nike's competitor: "Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing."[28]

Already's theory of competitive injury was that the continued existence of Nike's allegedly unlawful mark, notwithstanding Nike's covenant with Already, deterred investment in its company, thereby placing Already at a competitive disadvantage.[29] Already argued that a large company like Nike used its allegedly invalid trademark to

---

[25] *See* Maj. Op. 18.

[26] 568 U.S. 85 (2013).

[27] *Id.* at 88–89.

[28] *Id.* at 99.

[29] *Id.* at 97–99; *see also* Br. for Petitioner, *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) (No. 11-982), 2012 WL 3613367 at *33–34.

"bully small innovators" and that Nike's broad covenant not to sue could not "eradicate" the market effect of a "registered but invalid mark."[30] Thus Already's theory of competitor standing did not turn on whether Already planned to create a shoe to compete with a particular Nike shoe not covered by the covenant not to sue,[31] but was instead a broader claim about competitive injury. Already's allegations of Nike's intimidation tactics, if true, would have had a negative competitive impact on Already's business. Nike's allegedly unlawful conduct, in other words, would have placed Already on an unlevel playing field.

In rejecting Already's claim that this type of competitive injury was sufficient to establish Article III standing, the Supreme Court was quite clear that such a "boundless theory" of competitor standing is unacceptable under Article III.[32] Not every competitive injury—even though a competitor's allegedly unlawful actions may in fact skew the competitive field to the plaintiff's disadvantage—gives a competitor standing to challenge that action.

The plaintiffs' claim in this case is very much like the competitor standing claim in *Already*. Already and Nike were competitors (albeit mismatched in size) in the athletic-shoe market.[33] Already's theory of competitive standing was that Nike's allegedly invalid trademark deterred investment in Already and thus improperly chilled competition in that market. In this case, the plaintiffs claim similarly that the President's alleged constitutional

[30] *Already*, 568 U.S. at 99, 98.

[31] *See* Maj. Op. 20–21.

[32] *Already*, 568 U.S. at 99.

[33] *Id.* at 88.

violations are unlawfully skewing the competitive environment to his advantage.

The majority distinguishes *Already* on the basis that the plaintiffs here compete with the Trump-owned properties for identical consumers.[34] But that is the wrong inquiry, and in any case does not distinguish this case from *Already*. Already and Nike competed for at least some identical consumers, "in the same arena";[35] otherwise, there would have been no competitor issue in the case. Competitors, by definition, are always seeking to attract buyers who want the same goods or services. It is necessary rather to ask whether that competition is such that the harm will likely occur, as a matter of economic logic, from the violation of law alleged. Here, there is no logical connection between the President's alleged receipt of emoluments and the competitive success of the Trump-owned businesses. With or without the President's receipt of "emoluments," there are myriad reasons why a non-Trump establishment would face the same competition.

Moreover, it cannot be the case that, every time a competitor achieves some benefit through allegedly unlawful conduct that has no direct relationship to competition, competing businesses have standing to challenge that unlawful action simply by virtue of their status as a direct competitor.[36] Any number of potential illegal actions by a business could cause its rivals to face stiffer competition without giving rise to Article III standing. Take the example of an owner of a

---

[34] Maj. Op. 20–21.

[35] *USCC*, 885 F.2d at 1029.

[36] *See In re Donald J. Trump*, 928 F.3d at 377 ("At bottom, the [plaintiffs'] are left to rest on the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met.").

high-end restaurant in a competitive marketplace who fraudulently applies for and receives a bank loan from an FDIC-insured bank, or fraudulently applies for and receives a large tax refund. The restaurant's illegally obtained funds might allow it to achieve a market benefit available to no other competitor: the restaurant is able to hire a superior chef and undercut competitors on menu pricing. As a result, that restaurant's law-abiding competitors find themselves facing increased competition. But do the restaurant's competitors have competitor standing to hold the restaurant liable for its unlawful action simply because they "compete[] in the same arena"?[37] As the Supreme Court made clear in *Already*, the answer is no. The economic logic necessary for competitor standing is measured between the violation and the competitive harm, and in the hiring of the chef that economic logic is non-existent. Such is the situation here. The mere fact of competition is insufficient. Otherwise, courts would have to entertain every claim by a competitor in which the defendant received some unlawful benefit—a benefit unrelated to competition—simply because that benefit could have an effect on competition.

All of this leads me to question the expansive scope of our circuit's earlier precedent. To say that all a competitive injury requires is a showing that the plaintiff "competes in the same arena" conflicts with *Already*'s admonition that a market participant has not suffered constitutionally significant injury "whenever a competitor benefits from something allegedly unlawful."[38] Our formulation of this standing theory needs to be construed in light of the Supreme Court's limitations in *Already*. At any rate, even if our precedents required us to conclude that plaintiffs sufficiently alleged a competitive injury in

[37] *USCC*, 885 F.2d at 1029.

[38] *Already*, 568 U.S. at 99.

fact, I have little doubt that they fail to satisfy the remaining, indispensable Article III requirements of traceability and redressability.

Traceability. For there to be Article III standing, the plaintiffs must plausibly allege that their injury is "*fairly traceable* to the challenged action of the defendant."[39] Under the competitor-standing doctrine, courts have typically found that traceability flows readily from a competitive injury.[40] In these cases causation logically follows given the nature of the violation: if the violation would necessarily harm the plaintiff's competitive opportunities, then an unlawful edge to a competitor logically connects to that violation.[41]

But, again, this case is no ordinary competitor standing case. The Emoluments Clauses do not regulate business or market activity *as* business or market activity, nor would their violation as a general matter be expected to affect competition.[42] Conventional competitor standing cases do not present difficult traceability questions precisely because the allegedly unlawful action is directed at markets or market behavior, and thus the connection between a market-affecting action and a market effect is tight. The Emoluments Clauses were never

---

[39] *Lujan*, 504 U.S. at 560 (emphasis added) (internal quotation marks omitted).

[40] *See Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding that causation and redressability are "easily satisfied" in a competitor standing case); *New World Radio, Inc. v. F.C.C.*, 294 F.3d 164, 172 (D.C. Cir. 2002) (noting that, in "garden variety competitor standing cases" the "chain of causation" is "firmly rooted in the basic law of economics" (internal quotation marks omitted)).

[41] *See Sherley*, 610 F.3d at 72 (competitive injury caused when "agencies lift regulatory restriction on [the plaintiff's] competitors or otherwise allow increased competition against them" (internal citation and quotation marks omitted)).

[42] *See infra* Part II.

intended to regulate market behavior, and thus economic logic is absent.

The recognition that traffic increased at Trump-owned establishments following President Trump's election is not enough to show traceability. The plaintiffs must allege, beyond pure speculation, that the unlawful acceptance of emoluments from foreign and state government officials—not just the popularity of Trump-owned establishments for a myriad of reasons—is causing the plaintiffs' lost opportunity to compete on equal footing.[43] The plaintiffs have not plausibly alleged that the desire to confer a relatively modest[44] financial benefit on the President is the driving force behind increased competition.[45] And this must be plausibly

[43] In *Schulz v. Williams*, we held that traceability was satisfied as long as the challenged action (a district court injunction, in that case) "could have caused [the plaintiffs'] injury." 44 F.3d 48, 53 (2d Cir. 1994). But the bar is not as low, *see* Maj. Op. at 24, as this isolated language suggests. In *Schulz*, there was no speculation that the district court's injunction caused the plaintiffs' alleged electoral injury because there was no other action to which the asserted injury could have been traced. *Schulz* does not stand for the proposition that any action that theoretically "could have" caused the plaintiffs' injury will suffice. At this stage, the plaintiffs must allege a plausible causal route, not merely a possible one.

[44] The Trump Organization claims it donated approximately $150,000 in profit from foreign-government business to the U.S. Treasury in 2016 and approximately $191,000 in 2017 to offset financial gains to the President. Rebecca Ballhaus, *Trump Organization Details Level of Profits from Foreign Governments*, Wall St. J., Feb. 25, 2019, https://www.wsj.com/articles/trump-organization-details-level-of-profits-from-foreign-governments-11551116974. This is an infinitesimal amount in relation to the President's reported net worth of $3 billion in 2019. Shahien Nasiripour & Caleb Melby, *Trump's Net Worth Rises to $3 Billion Despite Business Setbacks*, Bloomberg, June 12, 2019, https://www.bloomberg.com/news/articles/2019-06-12/trump-s-net-worth-rises-to-3-billion-despite-business-setbacks. Of course, these specific amounts remain untested and unconfirmed.

[45] *See In re Donald J. Trump*, 928 F.3d at 375 ("To begin, the District and Maryland's theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends*

alleged because it stands to reason that diplomats who patronize high-end hotels and restaurants do not make their choices solely based on profit distribution, but as people with wide-ranging tastes and varying interests. The plaintiffs' and the President's establishments exist in a virtual sea of luxury hotels and restaurants[46] in which many different factors influence decision making and freely affect competition. There are simply too many variables at play (name recognition, boasting rights, better food, better service, more comfortable beds, reputation for quality, location close to the seats of power, to name a few)[47] to allow the plaintiffs to rest solely on the

---

*to the Presiden*t, rather than due to any of the Hotel's other characteristics. Such a conclusion, however, requires speculation into the subjective motives of independent actors who are not before the court, undermining a finding of causation." (emphasis in original) (citing *Clapper*, 568 U.S. at 413)).

[46] The plaintiffs' establishments, it should be noted, represent only a few of the many upscale restaurants and hotels located in New York City and Washington, D.C. By a rough count, there are approximately 115 five-star hotels in New York City and 47 in Washington D.C.. *See* Five Star Alliance, https://www.fivestaralliance.com. And when this lawsuit was filed in 2017, there were 77 Michelin star restaurants in New York City and 12 in Washington D.C. *See Michelin Guide 2017: New York's Best Restaurants*, Michelin Travel, https://travelguide.michelin.com/reportage/michelin-guide-2017-new-yorks-best-restaurants; *Michelin Guide Washington 2017: 12 Restaurants Earn Stars*, Michelin Travel, https://travelguide.michelin.com/north-america/united-states/district-columbia/washington-dc/reportage/michelin-guide-washington-2017. This count does not include the numerous high-end restaurants—like the ROC United restaurants Craft, Riverpark, Casolare Ristorante, and Zaytinya—that are not Michelin-starred. None of these other establishments have joined in this lawsuit to account for any possible competitive deprivation.

[47] *See In re Donald J. Trump*, 928 F.3d at 376 ("And, even if government officials were patronizing the [Trump International] Hotel to curry the President's favor, there is no reason to conclude that they would cease doing so were the President enjoined from receiving income from the Hotel. After all, the Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family. In short, the link between government

bare assertion that the President's acceptance of emoluments has caused them competitive injury.

On this point, the majority criticizes the district court for an error it did not make: requiring the plaintiffs to "dispel alternative possible explanations" for their asserted injury.[48] Of course, the majority is correct that a plaintiff need not disprove alternative causal routes, but the district court required of the plaintiffs no such thing. The district court instead listed factors that may influence whether a diplomatic patron will or will not frequent a Trump-owned property—"service, quality, location, price, and other factors related to individual preference"[49]—to illustrate why the causal chain in this case is speculative.

That the plaintiffs are not required to disprove alternative causation does not cure that they failed to plausibly allege *any* causal chain. I agree with the majority that "allegations of fact must plausibly support a 'substantial likelihood' that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions."[50] A review of the complaint, however, reveals few (if any) specific allegations that diplomatic patrons are motivated by the desire to confer emoluments on the President.[51] The most that is plausibly

---

officials' patronage of the Hotel and the Hotel's payment of profits or dividends to the President himself is simply too attenuated.").

[48] Maj. Op. 22–23.

[49] *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 185–86 (S.D.N.Y. 2017).

[50] Maj. Op. 22 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1974)).

[51] And, as the Fourth Circuit points out, "there is a distinct possibility . . . that certain government officials might *avoid* patronizing the [Trump International]

alleged is that Trump-owned properties attract diplomatic clientele, and that the President has publicly sought and encouraged such patronage.[52] But these allegations fall short of plausibly alleging (or permitting a reasonably plausible inference) that increased competition is caused by the President's acceptance of emoluments.

The plaintiffs rely on a Washington Post article in which diplomats are quoted stating that they and their colleagues will favor Trump-owned properties.[53] None of these statements reveal a specific motivation to confer a financial benefit on President Trump. They indicate nothing more than that the primary motivator is Trump-brand loyalty. The plaintiffs' strongest argument cites a line from that same article: "In interviews with a dozen diplomats . . . some said spending money at Trump's hotel is an easy, friendly gesture to the new president."[54] This allegation is too scant to satisfy plaintiffs' burden to affirmatively plead that their competitive injury is traceable to the President's acceptance of emoluments.[55]

Even if a government official were actually motivated to "enrich[]"[56] the President by staying at a Trump-owned hotel, the plaintiffs must plausibly allege that it is the acceptance of emoluments

---

Hotel because of the President's association with it." *In re Donald J. Trump*, 2019 928 F.3d at 376.

[52] Compl. ¶¶ 56, 58–87, 109, 196–97, 199–203, 206–11, 230–33.

[53] Appellants' Br. 38 ("Believe me, all the delegations will go there.") ("Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!'").

[54] Appellants' Reply Br. 12 (quoting Jonathan O'Connell & Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016).

[55] In my view, this is the case even after we accept the plaintiffs' (highly debatable) broad definition of emoluments.

[56] Maj. Op. 19, 21.

that is unlawfully distorting competition. The plaintiffs must affirmatively allege that conferring a direct benefit on the President makes a material difference when placed alongside all of the other reasons for patronizing Trump properties. Without allegations to that effect, the causal chain remains too speculative. To be sure, the plaintiffs need not disprove all alternative causal routes, but the plaintiffs still remain obligated to plead a casual chain that rises above speculation.[57] This they have not done.

Redressability. Finally, the plaintiffs must show that it is "likely . . . that the injury will be redressed by a favorable decision."[58] Like traceability, redressability frequently follows closely on the heels of a competitive injury in fact, but it is still a distinct component of Article III standing and must be plausibly alleged.

Wholly absent from the complaint are any plausible, non-conclusory allegations that the sought-after remedy will lessen the plaintiffs' competitive injury.[59] At the point in the complaint at which the reader might expect to be told how the remedy sought would redress the competitive injury, the reader is left empty-handed. The plaintiffs simply request that the court issue a declaratory judgment that broadly defines the Emoluments Clauses as the plaintiffs would like,[60] and ask for "[i]njunctive relief, enjoining [the President] from

---

[57] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").

[58] *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

[59] *Iqbal*, 556 U.S. at 678.

[60] The plaintiffs request, among other things, that "Emolument . . . of any kind whatever" under the Foreign Emoluments Clause be defined to "cover anything of value," and "any other Emolument" in the Domestic Emoluments Clause be defined to encompass "monetary and non-monetary payments or transactions, transactions granting special treatment, and transactions above marginal

violating the Foreign and Domestic Emoluments Clauses, as construed by this Court, and requiring [the President] to release financial records sufficient to confirm that [he] is not engaging in any further transactions that would violate the Emoluments Clauses."[61] As for how this relief will remedy the plaintiffs' competitive injury, the complaint only asserts in conclusory fashion that "the declaratory and injunctive relief . . . would provide a remedy for the many injuries described above."[62]

It comes as no surprise that the pleadings are insufficient as to redressability because they do not connect the relief requested to any effect on competition. The amicus brief by former national-security officials, relied upon by the plaintiffs,[63] cuts in the opposite direction from the argument that the plaintiffs use it to support. The brief highlights the plaintiffs' redressability problem, pointing out the obvious: "our adversaries and even our allies seek every advantage that is available on the international stage."[64] The various articles and statements cited by the plaintiffs demonstrate that diplomats choose to patronize Trump-owned properties for a variety of reasons—and most likely several reasons at the same time. None of them single out the conferral of emoluments. But, more to the point, there is no allegation that removing any one of the many possible incentives would cause diplomatic patrons to book at other establishments. To the contrary, as the former national-security officials point out,

---

cost . . . ." They ask the court to declare that the President's conduct violates both provisions. *See* Compl. VI(a).

[61] Compl. VI(b). One suspects that obtaining the President's financial records may be the true reason for this lawsuit.

[62] Compl. ¶¶ 239; 243; *see also* Compl. ¶ 242.

[63] *See* Appellants' Reply Br. 12–13 (citing Br. of Former Nat'l Sec. Officials 21).

[64] Br. of Former Nat'l Sec. Officials 21.

officials are likely to continue to seek "every advantage"—and continue to book at Trump-owned properties.

It is evident that the complaint fails to adequately plead redressability because it is virtually impossible to plausibly connect the purported cause of the plaintiffs' alleged harm to the remedy they claim to seek (but have not specified in the complaint)—an improved competitive environment. Even if "the mere possibility that customers might continue to favor the defendant's product or service after a court enjoins the violation does not defeat Article III standing,"[65] plaintiffs here have not particularized any causal connection between the alleged violation of the Emoluments Clauses and their market disadvantage. When plaintiffs come before a court unable to specify how the relief they seek will redress their injury, "one must wonder why they came to the court for relief in the first place."[66] In any event, the fact that the plaintiffs plainly fail to do so in the complaint is telling and is itself sufficient to defeat standing.

II.

As I have already noted, that the application of the competitor standing doctrine in this case will not satisfy the requirements of Article III standing is not surprising given the absence of economic logic between the violation alleged (the transgression of the Emoluments Clauses) and harm to the plaintiffs (competitive disadvantage). The nature of the cases in this area merits further elaboration. Only in certain categories has the economic logic been tight enough for courts to permit competitor-plaintiffs to shortcut the usual requirement of pleading injury in fact, traceability, and

[65] Maj. Op. 42.

[66] *In re Donald J. Trump*, 928 F.3d at 377.

redressability with particularity. These cases fall generally into three categories: agency cases, election cases, and unfair competition cases. It is only within these three categories that the cases relied upon by the plaintiffs (and the majority) to support their competitive standing theory can be found. In each of these three categories, the challenged governmental action or non-action is directed at parties in their capacity as a market player. This emoluments case, by contrast, fits into none of these three categories, and it is not analogous to any of them.

Agency cases. The competitor standing doctrine originated with agency cases. The first of these cases before the Supreme Court, *Investment Company Institute v. Camp*, involved banking regulations that allowed new institutions to enter certain financial sectors.[67]

Following that decision, competitor standing cases premised on a challenge to agency action have become common.[68] In *Adams v. Watson*, the First Circuit held that out-of-state milk producers had competitive standing to challenge state dairy regulations.[69] In *Canadian Lumber Trade Alliance v. United States*, the Federal Circuit determined that Canadian wheat producers could employ competitor standing to challenge United States customs regulations designed to

---

[67] *See Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1970) (investment companies had standing to challenge the regulation of national banks); *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (competitor brokerage trade association had standing to sue over banking regulations); *Nat. Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (banks and bankers association had standing to sue over credit union regulations).

[68] Some cases in this category could fall under the broader heading of "governmental action." *See Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) (farmers' cooperative had competitor standing to challenge the President's line item veto of a bill provision that would have benefitted the cooperative).

[69] *Adams*, 10 F.3d at 920, 925.

aid American wheat producers.[70] The D.C. Circuit, in *Sherley v. Sebelius*, held that adult stem cell researchers had competitive standing to challenge new regulations authorizing the National Institutes of Health to fund embryonic stem cell research.[71] I could go on.

In the agency context, where the government regulators are effectively choosing winners and losers in the marketplaces that they regulate, affording the plaintiff the presumption of injury, traceability, and redressability makes sense. There is no doubt, for example, that when the government allows a commercial bank to operate in a sector previously occupied only by investment firms,[72] the investment firms will suffer negative competitive effects because more actors occupy the field. In these cases, the challenged government action is directed at a *particular marketplace* with the aim of regulating one or more of the players in *that market* in some way. The government's decision to act in a way that gives a boost to some players in that market or allows a new player to enter it, will, as a matter of *economic logic*, be to the detriment of others.

Election cases. Competitor standing cases in the Second Circuit have arisen in the election context. In *Fulani v. League of Women Voters Education Fund*, the plaintiff, a presidential candidate, alleged that the League of Women Voters violated its tax-exempt status by hosting a primary debate that imposed certain admission requirements on the debate candidates, thereby causing the plaintiff-candidate a

---

[70] *Canadian Lumber*, 517 F.3d at 1332.

[71] *Sherley*, 610 F.3d at 73.

[72] *See, e.g.*, *Camp*, 401 U.S. at 620.

competitive injury when she was excluded from the debate.[73] We held that she had competitor standing to challenge the League's tax-exempt status.[74] The plaintiff in *Fulani* alleged that a law (aimed at preventing *political* abuse of an organization's tax-exempt status in the political marketplace) caused a competitive injury to her *political* candidacy which plainly would be redressed if she were permitted to debate. Her injury and its causation and redressability were self-evident as a matter of logic.

Likewise, *Schulz v. Williams* involved an action by the Libertarian Party to enjoin the operation of a New York election law that had blocked its candidates from getting on the state ballot.[75] The district judge granted the Libertarian Party an injunction. The competitor-intervenor Conservative Party appealed on the basis that the district court's injunction improperly placed Libertarian candidates on the ballot and thereby siphoned votes away from it.[76] We held that the intervenor-Conservative Party had standing to challenge the election law ruling that had allegedly caused it an electoral injury.[77]

Finally, in *In re U.S. Catholic Conference*, pro-choice advocates had competitive standing to challenge the tax-exempt status of the Catholic Church on the grounds that the Catholic Church had unlawfully engaged in partisan activities by campaigning for pro-life

---

[73] *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 624 (2d Cir. 1989). **[EVG, RJC, *LWP*]**

[74] *Id.* at 626.

[75] *Schulz*, 44 F.3d at 51–52.

[76] *Id.* at 52–53.

[77] *Id.* at 53.

causes.[78] By logic parallel to the agency cases, in each election case the competitor-plaintiff sought to challenge election-related action that allegedly had an obvious and direct negative impact on the plaintiffs' own political activities.

Unfair competition cases. The third context in which the competitor standing doctrine has arisen is in unfair competition claims.[79] Courts routinely recognize constitutional standing for competitors seeking to redress antitrust injury.[80] Suits by competitors brought under the Lanham Act are also commonly allowed based on competitor standing. In *TrafficSchool.com, Inc. v. Edriver, Inc.*, both parties ran online traffic-school courses in the same market. The plaintiff alleged that the defendant had engaged in false advertising in violation of Lanham Act and state unfair competition laws—a violation, unlike that here, that directly relates to competition.[81] The Ninth Circuit determined the competitor-plaintiff had standing because they were direct competitors and "[s]ales gained by one are thus likely to come at the other's expense."[82] This case exemplifies those cases in which, as a matter of economic logic, a competitor had

---

[78] *USCC*, 885 F.2d at 1022.

[79] *See TrafficSchool*, 653 F.3d at 825–26.

[80] *See, e.g.*, *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (recognizing Article III standing for a plaintiff allegedly injured by a competitor's antitrust violations). The plaintiffs suggest that standing for competitors in these cases supports their broad proposition that "courts have upheld Article III standing when the illegal acts of private parties increase or distorted competition against a plaintiff" and evinces the doctrine's application in "many other contexts." Appellants' Br. 28–29. But the plaintiffs miss the thread that ties all three categories of cases together: economic logic. The same economic logic that connects agency, election, and unfair competition competitor standing cases is absent in this case.

[81] *Id.* at 824.

[82] *Id.* at 825.

standing to challenge a rival's noncompliance with laws plainly designed to regulate their competition in the common marketplace.

* * *

These are the three broad categories of cases in which courts have extended to plaintiffs a presumption of competitive injury based on common-sense market logic. The cases in each of these three categories deal with challenged regulations, laws, and actions that were directed at market players *in their role as market players*, which is the key determinant that may warrant utilization of the competitor standing exception. These cases stand for the proposition that competitive injury in fact, together with causation and redressability, can be presumed when the plaintiff can point to some government action or inaction that *directly* regulates the conduct of a market player operating in the same market. In other words, plaintiffs in these cases were afforded competitor standing when they asserted a competitive injury as a result of an unlawful activity that was itself directly related to, and intended to regulate, the commercial or political marketplace.

The case before us is markedly different. The competitor standing suit against the President has little in common with these three categories of cases. Even accepting the plaintiffs' broad construction of the Emoluments Clauses, the Clauses were never designed to, and nor do they, directly regulate the marketplace or the market player as it functions in the marketplace. The Emoluments Clauses have never been characterized as market-oriented, no case has ever stretched the competitor standing exception this far, and, as is evident from the Supreme Court's decision in *Already*, such a stretch goes further than the competitor-standing pleading exception can bear.

In sum, because the plaintiffs lack standing to challenge the President's alleged acceptance of emoluments under either traditional standing principles or the competitor standing doctrine, I respectfully dissent.